IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ~~8~~ 4

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners,*

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

REPLY BRIEF FOR PETITIONERS ON REARGUMENT

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In Part I of this brief we repeat the reply brief filed in this case on argument for the convenience of the Court; and, in Part II of this brief we reply to the brief of Respondents on Reargument.

PART I.

In order to clarify the issues in this case and to indicate some minor corrections in the briefs and record and to disclose some apparent misconceptions on the part of respondents with respect to the legal theory underlying petitioners' cause of action, petitioners submit this reply brief.

This reply brief deals with certain of the points advanced

by the respondents in their brief which will be identified by number and language as used by respondents.

I.

The Complaint Filed Below States No Cause of Action Because, Inter Alia, It Fails To Set Forth Any Injuries To The Petitioners.

Here respondents rely upon the fact that minor petitioners do now attend a junior high school in said District of Columbia to support their assertion that the complaint fails to set forth any injury to the petitioners because (1) the compulsory law does not require petitioners to send their children to public schools and does not require them to go to any school; (2) the complaint fails to show by comparison that Sousa Junior High School has educational opportunities which are superior to educational opportunities in the high school which minor petitioners do now attend, and (3) the allegations of the petitioners are merely legal conclusions.

It is evident that respondents misconceive the gravamen of the complaint. For the purpose of determining whether the injury has been alleged it is only necessary to examine the allegations of the complaint with respect to factual matters in the light of the motion to dismiss. The motion to dismiss, like the old common law demurrer, admits all facts well pleaded. These facts are: that minor petitioners, Negroes, citizens and residents of the District of Columbia, accompanied by their parents, Negroes, citizens, taxpayers and residents of the District of Columbia, at the proper time for admission of students and possessing all qualifications for admission to a junior high school, applied to Sousa Junior High School for admission and enrollment and were denied admission and enrollment solely because of race or color. Admission to Sousa Junior High School was denied by respondent Eleanor P. McAuliffe, principal of Sousa Junior High School, solely upon the basis of race or color; and thereafter petitioners exhausted all of their

administrative remedies up to and including the Board of Education, which Board still denied admission and enrollment into Sousa Junior High School solely on the basis of race or color. The petitioners are suffering irreparable injury by reason of this action of respondents and are threatened with irreparable injury in the future at the hands of respondents.

These facts clearly show an admission by the respondents that they denied petitioners admission to Sousa Junior High School for no reason other than because of their race or color, and that this denial was injurious and threatened to injure the petitioners in the future. These are all the facts essential to establish a justiciable claim by the petitioners and to provide a basis for the relief requested of the Court by the petitioners. Not only did respondents admit all these facts in their motion to dismiss, but with respect to all these facts except injury, they enumerate them in their brief as a correct statement of the facts. On these admitted facts the only question before this Court is a question of law.

That question of law is—Whether the respondents possess the power to segregate pupils in the District of Columbia for the purpose of public education solely on the basis of race or color. Or to express it in another way, whether the action of respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color violates rights secured to petitioners by the Constitution and laws of the United States. The court below dismissed the complaint, thus deciding this issue in the negative.

In the transmission of the record in this case, from the District Court to the United States Court of Appeals for the District of Columbia Circuit, and in turn to this Court, a clause in paragraph sixteen of petitioners' original complaint was inadvertently omitted. This clause, italicized in the paragraph set out below, we submit for inclusion in the proceedings in this case.

"16. A present actual case or controversy exists between plaintiffs and defendants. Plaintiffs, and other Negroes similarly situated, on whose behalf this suit is brought, are suffering ireparable injury, *and are threatened with irreparable injury* in the future by reason of the acts of defendants hereinbefore set forth. They have no plain, adequate or complete remedy to redress the wrongs or illegal acts hereinbefore set forth other than this action for an injunction. Any other remedy to which plaintiffs, and other Negroes similarly situated, could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury, damage, vexation and inconvenience to plaintiffs and other Negroes similarly situated."

This clause as above set out was a part of the original complaint with respect to which the court below granted the motion to dismiss, and its inclusion here can in no wise prejudice the case of the respondents.

On the legal issue as to the power of respondents to take the action complained of, the mere deprivation of a civil right by government, has been held by this Court in numerous cases, to constitute injury. See: *Giles* v. *Harris,* 189 U. S. 475 (1903). In addition, the respondents admitted the well pleaded operative factual allegation of injury contained in paragraph 16 which allegation was not a legal conclusion.

As to the assertion that these petitioners were not compelled by law to send their children to any school or to the public schools, it is sufficient to point out that having chosen to avail themselves of the educational opportunities afforded by the government in the public schools, as they had a right to do, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), petitioners were compelled by threat of criminal sanction to send their children to the school set apart by the respondents for Negroes alone.

As to respondents' contention that the failure of the petitioners to compare educational opportunities offered in

the school they now attend with those afforded in Sousa Junior High School, it is apparent that respondents misconceive the legal theory underlying the complaint. Petitioners complain of a deprivation of the right to choose Sousa Junior High School without any limitation based solely on race or color, irrespective of the nature and availability of educational facilities elsewhere. Quite apart from that, petitioners' concession of equality of facilities is not a concession of equality of educational opportunities, for it is implicit in petitioners' complaint that the mere denial of admission on the basis of race or color is a denial *per se* of educational opportunities. The offering of education to minor petitioners in a segregated school is *per se* a limitation on the enjoyment of educational opportunities.

Thus, this case as presented to this Court on the complaint and the motion to dismiss, presents a record in which the factual basis is present for the relief sought and the only question remaining is whether the action of respondents herein complained of violates the Constitution and laws of the United States.

II.

A. Acts of Congress Providing For Education of Children of The District of Columbia Require Such Education In a Dual School System And Have Been So Construed by This Court.

B. Construction of Locally Applicable Laws By The Highest Court of The District of Columbia Is Normally Accepted By This Court.

Under this heading the respondents attempt to demonstrate that the congressional enactment of statutes relating to public education in the District of Columbia and the judicial interpretation thereof by the lower courts have accomplished a construction of these statutes which is binding upon this Court. It is the petitioners' position that the statutes in question do not authorize racial segregation nor do the re-enactments after an intervening judicial construc-

tion by a lower Federal court that the statutes do require racial segregation, bind this Court to accept this construction. At most, the re-enactment of congressional legislation and the judicial construction of that legislation by lower Federal courts are but aids to this Court in making its independent determination as to the proper construction to be given to the statutes. In *Federal Communications System* v. *Columbia Broadcasting System,* 311 U.S. 132, Mr. Justice Frankfurter states at page 138:

> "We are not, however, willing to rest decision on any doctrine concerning the implied enactment of judicial construction upon re-enactment of the statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language."

It is certainly not arguable that the decision of *Carr* v. *Corning,* 86 App. D. C. 173, 182 F. (2d) 14 (1950), creates a well settled interpretation that these statutes compel segregation and are constitutional. As this Court said in *United States* v. *Raynor,* 302 U.S. 540 at 551:

> "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of *Krakowski,* 161 Fed. 88, held that the act only prohibited possession of the distinctive paper, does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well settled interpretation."

Where constitutional rights of individuals are concerned this Court has assumed the duty "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality" (*United States* v. *C.I.O.,* 335 U.S. 106, 120-121) and certainly it is the position of the petitioners that to adopt the construction given these statutes by the Court of Appeals in *Carr* v. *Corning,* supra, would create a danger of unconstitutionality. The position of the respondents, with respect to the construction of these

acts, therefore, is untenable. We agree with the language of this Court in this connection in *Helvering* v. *Reynolds*, 313 U.S. 428, at 431:

> "Respondents' position is not tenable . . . that rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities it does not mean that the prior construction has become so imbedded in the law that only Congress can effect a change."

III.

The Dual School System In The District of Columbia Is Not Violative of The Fifth Amendment To The Constitution of The United States.

In this section the respondents, in an apparent misconception of the law applicable to the complaint of the petitioners, first argue that Congress has more power to legislate for the District of Columbia than the State Legislatures have for the States. Then they argue that whatever limitations exist upon the States in the Fourteenth Amendment, no greater limitations exist with respect to the Federal Government in regard to racial disabilities imposed upon Negroes. They argue, for example, that under the Fifth Amendment slavery was constitutional, and that since the Fourteenth Amendment has not prohibited the establishment of the "separate but equal" doctrine in the education cases in the States, that it is certainly not prohibited by the Fifth Amendment. This is a misconception of the fundamental nature of the Federal Government.

Equality, equal justice under law, liberty, freedom of speech and association, and freedom of religion are fundamental and basic principles underlying the foundation of our government. Our government is one of laws and not of men. In this system, race is irrelevant. The system of slavery, constitutionally recognized both in the Constitution and in *Dred Scott* v. *Sanford* (citation), 19 Howard 393, was abolished by the Thirteenth Amendment. Citizen-

ship was conferred upon Negroes under Clause 1 of the Fourteenth Amendment and thus both the system of slavery and the lack of citizenship status of the Negro set forth in the *Dred Scott* decision were removed as sources of constitutional power for the imposition of racial distinctions by the Federal Government upon Negroes. Thus our Government was brought into harmony and accord with its fundamental and basic principles—equality for all citizens—and a constitution that is color-blind.

The Federal Government is one of express powers and implied power necessary to carry out the express powers. It is too clear for argument that, since the Thirteenth and Fourteenth Amendments, the Federal Government has no express power to make racial distinctions in affording educational opportunities to citizens in the District of Columbia. It is the petitioners' position that there is likewise no implied power to do so.

This Court has recognized such power in the Federal Government in only one series of cases—the Japanese War Cases—in which it was dealing with the all-embracing war power. There this Court found an implied power, necessary to deal with sabotage and espionage under threat of invasion in the midst of a world-wide conflict, to deal on the basis of ancestry with loyal citizens who were comingled with disloyal persons. Even there this Court laid down drastic limitations governing the exercise of this implied power. It is apparent that integrated education in the District of Columbia presents no such threat to our National security. And no implied power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color can be implied from the express power given Congress over the District of Columbia.

As an apparent justification for compulsory racial segregation in public education, respondents dwell at length upon quotations from Negroes who were urging the passage of a statute in 1906 designed to increase the power of the Negro superintendent of schools. The constitutional rights

of petitioners are neither added to nor diminished by the irrelevant opinions of isolated individuals, Negro or white. This Court has said that the rights which petitioners assert here are individual rights. *Gaines* v. *Canada,* 305 U.S. 337. It is of no importance in this case as to whether the "separate but equal" doctrine is constitutionally permissible under the Fourteenth Amendment, although we take the position that it is not; for even if we concede, which we do not, that equal protection of law may be constitutionally satisfied under a racial classification, by testing the quantum of treatment afforded Negroes under the substantially equal theory—it is juristically inconceivable that we can test liberty under the due process clause of the Fifth Amendment by the quantum of liberty which is enjoyed. A deprivation of individual liberty under the due process clause must be tested by the reasonableness of the action of the government. The test is whether the action is arbitrary but never as to how much liberty is taken. Thus the opinions of individual persons as to whether segregation is good or bad is irrelevant and the test of the deprivation of liberty under the Fifth Amendment cannot be measured by the quantum test apparently used under the equal protection clause of the Fourteenth Amendment in civil rights cases.

Moreover, the decision as to the constitutionality of the respondents' action in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color is strictly a legal question to be determined by this Court and legislative policy or action is not determinative.

PART II.

PETITIONERS TREAT RESPONDENTS ANSWERS TO QUESTIONS 4(a) AND 5 AS ONE ARGUMENT IN THIS REPLY.

I.

In their Brief on Reargument counsel for respondents undertake to justify what they refer to as a "strictly legal position" in support of respondents actions in excluding minor petitioners from Sousa Junior High School solely because of race or color. Counsel for petitioners recognize that this undertaking is both difficult and delicate by reason of the absolutely contrary position of other high government officials, but it is respectfully submitted that the Brief for Respondents on Reargument not only fails to meet the issues as raised by petitioners, but confuses the issues involved in the instant case with those involved in the "state cases", and makes assumptions that are not supported by available facts. It is a fact, as set forth by respondents on page 18 of their brief, that the policy of the President of the United States is to use all applicable authority of his high office to terminate all forms of segregation in the Nation's Capital. It is likewise a fact that the highest legal officer of the United States, the Attorney General, has filed a brief in this case in which he agrees with petitioners' views that respondents do not have the power or authority to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color. It is also a fact that the District Commissioners have ordered an end to all discrimination and segregation in the District Government. Thus, not only do the superior officers of the Government differ with counsel for respondents as to this "strictly legal position" but counsel on page 18 of their brief say that even some of the respondents themselves differ with them. Yet counsel for respondents say they are taking a "strictly legal position" which they believe is sound. This anomalous position of counsel for respondents is reflected in the various inconsistent positions taken in their brief.

On page 13 of their brief counsel for respondents say they do not suggest that a gradual adjustment would be desirable or, indeed, necessary—but on page 15 of their brief they argue that time should be given "to properly indoctrinate teachers and the public to a radical change in the local educational policy." This is in fact a gradualist argument. Thus, it is difficult if not impossible, for petitioners to know what the "strictly legal position" of counsel for respondents really is.

Again throughout the brief counsel for respondents argue that the history of the Fourteenth Amendment is irrelevant to the District of Columbia case; yet on pages 17 and 18 of their original brief they argue that this history is relevant. We must presume then that counsel are abandoning that line of argument in their latest brief. In this latest brief on page 16 they proceed to analyze the effect of decrees in the four state cases and even to include segregation in all other areas in the United States as being involved in the decision and decree in this case. On page 17 of the brief counsel deal with "eighteen separate political subdivisions of the United States which would be obliged to make revolutionary changes in what has been described as 'a way of life' ". Again counsel for petitioners find it extremely difficult to answer as to any subdivisions or changes except those involved in the District of Columbia case. "The way of life" in the District of Columbia is completely nonsegregated except in education. We are unable to determine then to what "way of life" counsel for respondents refer in the District case.

Again on page 15 counsel for respondents say that petitioners will not suffer since there is no question of equality of facilities; here counsel do not address themselves to the issue of deprivation of liberty but are still arguing as if they are counsel in the four state cases and are enmeshed in the separate but equal philosophy growing out of the interpretation of the Fourteenth Amendment and the so-called *Plessy Doctrine.* None of this is involved in the District case under the Fifth Amendment.

Respondents' counsel disclaim the possibility of bloodshed in effectuating integration in education, with which disclaimer we heartily agree. Subsequent references to possibilities of racial conflict and quotations from a decision by this Court in a case involving issues not even remotely related to any issues present in the instant case are irrelevant.

Counsel for respondents concede that should this Court invalidate enforced racial segregation in public education in the District of Columbia, the only delays in changing to an integrated system would be administrative in nature. Then they pose several administrative problems which they assume are present and assert that the time needed to solve them cannot be predicted. Had counsel for respondents conferred with their clients—the Board of Education—they would have been advised that substantial "indoctrination of teachers" is already an accomplished fact. They also would have been advised that their clients—the Board of Education—"will not be unprepared in the event that major changes in organization are required." Under administrative delays they list a substantial amount of time for indoctrination of teachers, the problem of locating instructors, and the necessity for securing appropriations from Congress to finance the program.

The fallacy of the argument that substantial time would be needed for indoctrination of teachers is demonstrated by (1) the existence of an integrated teachers union with several hundred members of both races, and by (2) reference to the present contacts of colored and white teachers in the two divisions of the public schools of the District of Columbia engaged in without untoward incident, on a wholly integrated basis. Approximately 80% of all the educational personnel in the District of Columbia public school system have served on one or more of these integrated committees:

(1) System-wide committees and groups
(2) In-service training programs
(3) Officers meetings

(4) Departmental meetings of teachers with respective department heads
(5) General meetings of teachers and officers

The documented details under each of the foregoing captions is here set forth, representing only partial listings in a number of instances:

System-Wide Committees

School House Building Standards
100 teachers and officers; about 50% from each division; 12 sub-committees; 6 Negro chairmen (S. C. [superintendents circular] #94, 1949)

Text Book Committees; 2 Co-Chairmen for each of the 5 sub-committees, one from each Division; 93 teachers and officers involved (S. C. #25, 9/17/53)

Committees on Books for Libraries, 44 teachers and officers, about 50% from each division (S.C. #45, 11/14/52)

Committee on Recruitment, Examination and Appointment of Teachers, 16 officers and teachers, about 50% from each division (S.C. #49, 11/28/52)

Committee on Blank Forms—10 officers—a continuing committee, about 50% from each division (S.C. #58, 1/6/53)

Permanent Committee on Provision of Supply Schedules. Co-Chairmen from Divisions 1 and 2; approximately 35 officers on (S.C. #77; 3/9/53) steering Committee; approximately 130 teachers on sub-committees; Co-Chairmen from Divisions 1 and 2 for each of the 23 sub-committees (S.C. #89; 4/8/53)

Additional Schoolhouse Standards Committee on Shop Layouts for Tech. H.S.; 7 members, 3 Negro and 4 white; 2 Division 1, 2 Division 2; 3 Central Staff (S.C. #52; 11/25/53)

The Court is respectfully requested to take judicial notice of the following official committees of the District of Columbia School System, all of which are completely integrated:

Committees on City-wide Pupil Testing—Approximately 50 teachers and officers; Assoc. Supt's Foster (Div. 1) and Hypps (Div. 2), Co-Chairmen.

Joint Legislative Council—over 10 years old; includes representation from approximately 75 organizations of school personnel.

Teachers Advisory Council—Representatives from all schools and officer groups—approximate membership 80.

Curriculum Committees—go back more than ten years; hundreds of teachers involved. Actually began under Dr. Ballou about 1924.

Committees on Salary Revision—currently active on proposed legislation.

Coaches Organization—have met together periodically for past 4 years on common problems.

In-Service Training Programs; widely attended by teachers and officers of both races:

Prescott lecture—Roosevelt High School, 10/6/53 (S.C. #20; 9/23/52)[1]

Courses at Washington School of Psychiatry—600 teachers, 50% colored, 50% white, both sem. (Also held previous year) (S.C. #26; 9/25/52).

Panel on Cancer—Roosevelt High School, 1/15/53. All School personnel invited (S.C. #56; 1/2/53).

Panel on Tuberculosis—Roosevelt High School, 3/12/53 —All school personnel invited—Negro physician was one discussant (S.C. #56; 1/2/53).

Series of 5 meetings at Roosevelt High School for all officers and teachers on subject of school health, 3/2, 3/23, 4/6, 4/27, 5/11/53, hundreds in attendance (S.C. #72; 2/9/53).

Visit of all teachers (3500) to exhibit arranged at Raymond School by General Textbook Committee, March 9, 10, 11, 12/53; visits of school personnel scheduled at random (S.C. #75; 2/26/53).

Washington School of Psychiatry Courses—8:00 to 9:30 P.M., Oct. 15, Nov. 19, Dec. 17/53, Jan. 21, 1954; 450 enrolled (S.C. #20; 9/11/53).

Officers Meetings—integrated:

Supt's. Staff; 28 meetings scheduled for school year 1952-53. (S.C. #24; 9/25/52).

Presidents of Teachers Col.; 7 meetings scheduled (S.C. #24; 9/25/52).

Senior High School Principal Division 1 and 2; 7 meetings scheduled (S.C. #24; 9/25/52).

Junior High School Principal Division 1 and 2; 7 meetings scheduled (S.C. #24; 9/25/52).

Vocational High School Principal Division 1 and 2; 4 meetings scheduled (S.C. #24; 9/25/52).

Directors of Elementary Education, Division 1 and 2; 8 meetings scheduled (S.C. #24; 9/25/52).

Heads of Department, Division 1 and 2; 4 meetings scheduled (S.C. #24; 9/25/52).

Superintendent's meetings with all school officers held 3rd Monday each month (S.C. #24; 9/25/52).

Judge Cockrill addressed all officers at Roosevelt High School, 11/10/52 (S.C. #41; 10/22/52).

Associate Superintendents of Research, Division 1 and 2, Dr. Foster and Dr. Hypps respectively discuss "uneducables"—all officers (S.C. #57, 1/2/53).

Officers Meeting 8/19/53 (S.C. #40, 8/12/53).

Departmental Meetings—integrated

Series of 3 joint meetings of Departments of Home Economics, Science, Physical Education (several hundred persons) 11/6/53; 1/15/53 and 3/12/53 (S.C. #44; 11/3/53).

SUMMARIES OF PARTICIPANTS IN THE AMERICAN FRIENDS SERVICE COMMITTEE SEMINARS FOR TEACHERS[1]

Total No. of Hours—10

Theme	Date 1953		Directors Division I	Directors Division II	Librarians Division I	Librarians Division II	Teachers Division I	Teachers Division II	Counselors Division I	Counselors Division II	Principals & Ass't. Prin. Division I	Principals & Ass't. Prin. Division II	Others Division I	Others Division II	Totals
The Classroom Problems of an Integrated School System	3/6, 7		1												
		E					5	6			4	3			
		J						2	1		1	1			
		V													
		S					3	1		1					(29)
The Teacher in an Integrated School System	3/20, 21			1											
		E					2	4			4	2			
		J					5	5		1					
		V						1							
		S			1		2	1				2			(31)
Approaches to School Integration	5/15, 16	E					5	8				3			
		J					1	3							
		V					1								
		S			1		3	2							(27)
Human Relations in an Integrated School System	11/6, 7	K					3								
		E					2	9			1	4			
		J					2	1							
		V					1								
		S					4	1	1				2	2	(33)
		Totals	1	1	2		39	44	2	2	10	15	2	2	(120)

Others include: A training specialist and a sight conservation teacher in Division I.
An elementary supervisor and a teacher of the physically handicapped in Division II.

Letters: E—Elementary J—Junior High V—Vocational High S—Senior High K—Kindergarten

THE EXPECTED NUMBER OF PARTICIPANTS FOR THE DECEMBER 4 AND 5 SEMINAR IS 30; THE DISTRIBUTION IS NOT AVAILABLE YET.

30 participants are expected to enroll in the seminars in February and March.

Grand Total for the Seminars held from March, 1953 to November, 1953 120
Grand Total for Seminars previously held and those expected enrollments 210

General Meetings of Teachers and Officers—integrated.

Two General meetings of school personnel on salary bill.

11/9/53 Elementary Personnel Div. 1 and 2.

11/10/53 Secondary Personnel Div. 1 and 2 (S.C. #40; 11/4/53).

In addition to those in service meeting a number of the teachers in the public school system have attended inter-group relations seminars given by the American Friends Service Committee.[1]

FOOTNOTE TO CHART ON OPPOSITE PAGE

[1] Summary of Reports of Participants in *A Program of Seminars For Washington Public School Teachers (Looking Toward Our Role in An Integrated School System)*, American Friends Service Committee, Community Relations Program, Washington, D. C., March 6-7, 1953; March 20-21, 1953; May 15-16, 1953; November 6-7, 1953.

American Friends office volunteers the opinion that over ninety per cent of the teachers of both divisions who have been trained in their seminars are equipped to carry on similar work in their own school buildings. Thus, the nucleus of 200 or so trained persons who will have had the benefit of seminars experience with the American Friends represent instructional resources in their respective buildings. Inasmuch as the selection of persons for the American Friends Seminars has been distributed as widely as possible among school buildings, the chances are that most faculties would have someone in their ranks with the proper conditioning for leadership. The American Friends office gives assurance that if called upon they could greatly augment their services and facilities for inter-group education in Washington. Likewise, it is probable that other similar resources could be expected to carry their share of the load including, for example, National Conference of Christians and Jews, the Anti-Defamation League, the American Association of University Women, the League of Women Voters.

Addressing ourselves to what the Corporation counsel refers to as being a second major consideration—the matter of teacher replacements and promotions—we find again an exaggerated statement of what as a matter of fact is a relatively minor problem. The Rules of the Board of Education, admittedly the controlling law, presently provide for and the annual practice carries out a merger of eligibility lists compiled from the results of competitive examinations given at different dates. It cannot reasonably be argued that the plan assumes any additional proportions because the individuals involved are of different races. All that the Board of Education need do is to amend its Rules and provide for the merger of these two lists and no time element is involved. Since promotions are presumably based upon merit no problem of time or of any other character can reasonably be posed for this so-called problem. To suggest that any considerable time would be consumed in locating instructors or working out the program for financing the integrated plan is negatived first by the personal relationships set forth above; secondly, by the fact that a large number of the teachers have already had courses in intergroup relations given by the American Friends Committee, American University, Catholic University, George Washington University and Howard University, in cooperation with the Board of Education. It is partially negatived, thirdly, by the fact that there is available from an original annual appropriation of $3000 for in-service training the sum of approximately $2000. A like sum of $3000 will become available for this purpose on July 1, 1954 in the pending appropriation bill.

The basic weakness of respondents position lies in the false assumption that because the Board rules have the effect of law the Board lacks power to amend or modify those rules. *U. S. ex rel Denny* v. *Callahan*, 54 App. D. C. 61,294 F. 992, cited by Respondent clearly recognizes the authority of the Board to exercise its discretion in the selection and appointment of teachers. In that case an

applicant for a position, who was number one on the eligible list when a vacancy occurred, was denied the job. She then sued to obtain the position. While this suit was pending the Board changed the eligible list. The Court held that under those circumstances the Board could not do this.

Under the present rules of the Board as set forth in respondents' brief Appendix, p. 4, rule eleven at p. 5, and 6 provides for the merger of eligibility lists after each examination "irrespective of the date of examination." Certain it is that if the eligibility lists can be and have been merged without regard to date, merger without regard to race cannot present a serious obstacle to integration of personnel. The Court is asked to take judicial notice of the fact, well-known in the community, that the Board of Education intends to conduct its examination this school year of white and colored teachers of physical education by giving one and the same examination to both groups. (Minutes of Meeting of the Board of Education, June 24, 1953.)

Eligibility rosters in public employment are not unlike seniority rosters in private industry where it has long been the rule that although seniority is generally considered as a property right of an employee, it is nevertheless within the power of a union to modify or destroy an individual's seniority in a subsequent collective agreement. The analogous action in public employment is the modification of the statute or administrative order upon which the preferential right is based. So long as the modification is not arbitrary, no valid objection arises, *Elder* v. *N. Y. Central R.R. Co.*, 152 F. 2d 361 (C.C.A. 6th 1945).

The most devastating rebuttal to the Corporation Counsel's contention that the District of Columbia is unprepared for the possibility of an immediate end of segregation in the public schools comes from the pen of his own client, the Superintendent of Schools, one of the respondents. In the "Report of the Superintendent of Schools to the Board of Education, 1952-1953," The Superintendent of Schools of the District of Columbia says at pages III and IV:

"During the past year the Board of Education, the Superintendent of Schools, and the school officers have concerned themselves with planning for the general reorganization of the schools which may be brought about as a result of the decision of the Supreme Court on the cases concerning segregation of the schools pending before it. Although there is no way to anticipate what decision the Court may render or the exact changes in organization which may be necessary as a result of its action, efforts are being made to be prepared for any eventuality. Consistent with this general plan the Board of Education invited the organized citizenry of Washington and any interested individuals to send to the Board of Education written statements expressing their ideas on the mechanics of integration of the schools should the present system of segregation be abolished by the Supreme Court's decision, and also on the methods to be employed to educate the public for any change which may be required. In response to this invitation 160 replies were received. In most instances groups and individuals sent in statements which were very helpful and which indicated thoughtful consideration of the question. These statements were analyzed and tabulated, and the various suggestions made have been and are being considered in connection with any planning for a change in school organization which may be necessitated by the Supreme Court's decision.

"Subsequently the Board of Education held a hearing to which it invited 30 leading citizens to appear before the Board to give their advice. This hearing, too, proved to be very helpful in planning for any changes which may be required.

"During the past several months the Superintendent and his staff have held a series of meetings to formulate plans, procedures, and techniques of transition from one type of organization to the other. This has been done so that the Superintendent will be ready to recommend to the Board certain changes should they be required. Obviously it is not known whether changes will be required by the decision and certainly the exact terms of transition cannot be known until the full text of the decision is made public.

> Should the Supreme Court rule against segregation it will be necessary that any plans that may have been evolved be revised in the light of the specific terms imposed by the decision. *The Superintendent and the officers will not be unprepared in the event that major changes in the organization are required.*" (Emphasis supplied).

A revealing experiment in integration is available in the experience of the State of New Jersey. This eminently successful operation, involving forty-three school districts, including some large cities, a few fair-sized rural county seat towns, some small industrial areas, some agricultural townships and a few very high-level economic suburban communities, was accomplished in less than one year, except in the case of three districts where school buildings had to be constructed. The late Joseph S. Bustard, Assistant Commissioner of Education of the State of New Jersey, in commenting on this significant achievement in integration, on a state-wide basis in a complex situation, said:

> "While New Jersey cannot furnish any one formula, it can testify that complete integration in the public schools can and will work. It may even be safe to say once more, that the way to learn to do a thing is to do it, and in this respect, New Jersey has proven again that the best way to integrate is to do it." Bustard, "The New Jersey Story: The Development of Racially Integrated Public Schools." *Journal of Negro Education,* P. 285, Vol. 21, No. 3.

In the Brief on Reargument petitioners advanced the argument that the public policy of our national government as enunciated by the President and the public policy of the District of Columbia Government in process of effectuation are opposed to all governmental distinctions based on race or color. In their Brief on Reargument, page 18, counsel for respondents concede the factual support for this argument, and suggest no conclusion different

from that drawn by petitioners. It is respectfully submitted therefore that counsel for respondents concede that the actions of respondents herein complained of are violative of national policy and as well of the public policy of the District of Columbia.

CONCLUSION

Petitioners believe that the other points advanced by respondents have been fully covered in petitioners' brief on the merits, and for that reason are not touched upon here.

Respectfully submitted,

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